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2 **UNITED STATES DISTRICT COURT**

3 **DISTRICT OF NEVADA**

4 Elder Zacarias-Lopez,

5 Petitioner,

6 v.

7 Brian Williams,

8 Respondent.

Case No.: 2:20-cv-00175-KJD-BNW

**Order**

9  
10 On February 10, 2020, this court denied petitioner's motion to proceed *in forma pauperis*  
11 and directed him to pay the filing fee in order to proceed with his petition for writ of habeas  
12 corpus pursuant to 28 U.S.C. § 2254. ECF No. 4. He has paid the required fee. ECF No. 7.  
13 Thus, his petition and accompanying motion for appointment of counsel will be filed.

14 The court has reviewed the petition under Rule 4 of the Rules Governing Habeas Corpus  
15 Cases Under Section 2254. With his petition, petitioner seeks to set aside a Nevada conviction  
16 for first-degree murder entered in 2002. As an initial matter, the court notes that petitioner  
17 brought a previous habeas action in this court challenging the same conviction. *Zacarias-Lopez*  
18 *v. Neven*, 2:05-cv-01156-JCM-PAL. In that proceeding, the court granted habeas relief and  
19 ordered that petitioner be provided with a new penalty hearing. *Id.*; ECF No. 37. According to  
20 the petition to be filed herein, petitioner waived his right to a new hearing and received a  
21 negotiated lesser sentence of 20 to 50 years with a consecutive like sentence for use of a deadly  
22 weapon. ECF No. 1-1 at 5-6. An amended judgment of conviction was entered on March 21,  
23 2012. *Id.* at 6.

1 Normally, 28 U.S.C. § 2244(b) significantly limits a habeas petitioner’s ability to bring a  
2 second or successive petition when his prior petition challenging the same conviction has been  
3 adjudicated on the merits. *See Burton v. Stewart*, 549 U.S. 147, 153(2007). The Supreme Court  
4 has held, however, that “where ... there is a ‘new judgment intervening between the two habeas  
5 petitions,’ [the petition] challenging the resulting new judgment is not ‘second or successive’ at  
6 all.” *Magwood v. Patterson*, 561 U.S. 320, 341-42 (2010). In addition, it matters not that the  
7 second petition challenges components of the original judgment that were not altered by the  
8 intervening amended judgment. *See Wentzell v. Neven*, 674 F.3d 1124, 1127 (9<sup>th</sup> Cir. 2012).

9 With that understood, the court notes in screening the petition that Ground 1 asserts a  
10 cognizable habeas claim – i.e., it alleges a constitutional violation arising from the jury  
11 instructions on first degree murder used in his trial. In Ground 2, petitioner states that he is  
12 asserting an “actual innocence” claim. ECF No.1-1 at 13. The Ninth Circuit Court of Appeals  
13 “[has] not resolved whether a freestanding actual innocence claim is cognizable in a federal  
14 habeas corpus proceeding in the non-capital context, although [the court has] assumed that such  
15 a claim is viable.” *Jones v. Taylor*, 763 F.3d 1242, 1246 (9<sup>th</sup> Cir. 2014). It appears, however, as if  
16 petitioner is also attempting, in Ground 2, to assert constitutional claims based on trial court error  
17 and prosecutorial misconduct. Instead of being combined under one ground, each factually or  
18 legally distinct claim for relief must be pleaded under a separate ground for relief. Accordingly,  
19 the court will provide petitioner the opportunity to file an amended petition if he so chooses.

20 If he decides to file an amended petition, petitioner is advised to closely follow the  
21 instructions provided with the court’s form petition for writ of habeas corpus, as well as the  
22 instructions on the form itself. In particular, petitioner should note that every claim in which he  
23 contends there was a violation of his constitutional rights is a separate ground for relief and must

1 be pleaded under a separately-numbered ground in the form petition. In other words, each  
2 contention petitioner believes to be sufficient for the court to grant relief is a claim/ground and  
3 must be separately presented, not mixed into the discussion of another claim/ground. In addition,  
4 each ground must include all the relevant facts that support it, but only those facts. Lastly,  
5 petitioner is not limited in the number grounds he may include in his federal petition, but federal  
6 habeas relief is not available for claims that have not been properly presented to the Nevada  
7 Supreme Court.

8         The court, therefore, instructs petitioner to consider the matter carefully and to determine  
9 all possible claims for habeas corpus relief. If petitioner knows or learns of any exhausted or  
10 unexhausted claims which are not included in the present petition, petitioner should include these  
11 additional claims in his amended petition. Petitioner's failure to inform the court of these  
12 additional claims may prevent petitioner from ever raising these claims at a later date.

13         In addition, petitioner has filed a motion for the appointment of counsel. Pursuant to 18  
14 U.S.C. §3006A(a)(2)(B), the district court has discretion to appoint counsel when it determines  
15 that the “interests of justice” require representation. There is no constitutional right to appointed  
16 counsel for a federal habeas corpus proceeding. *Pennsylvania v. Finley*, 481 U.S. 551,  
17 555(1987); *Bonin v. Vasquez*, 999 F.2d 425, 428 (9<sup>th</sup> Cir. 1993). The decision to appoint counsel  
18 is generally discretionary. *Chaney v. Lewis*, 801 F.2d 1191, 1196 (9<sup>th</sup> Cir. 1986); *Bashor v.*  
19 *Risley*, 730 F.2d 1228, 1234 (9<sup>th</sup> Cir. 1984). However, counsel must be appointed if the  
20 complexities of the case are such that denial of counsel would amount to a denial of due process,  
21 and where the petitioner is a person of such limited education as to be incapable of fairly  
22 presenting his claims. *See Chaney*, 801 F.2d at 1196; *see also Hawkins v. Bennett*, 423 F.2d 948  
23 (8<sup>th</sup> Cir. 1970). At this point, the issues in this case are not particularly complex, and petitioner

1 has demonstrated the ability to articulate his claims. It does not appear that appointment of  
2 counsel is warranted in this instance. Petitioner's motion for the appointment of counsel is  
3 denied.

4 IT IS THEREFORE ORDERED that the Clerk shall file the petition for writ of habeas  
5 corpus and the motion for appointment of counsel. The Clerk shall also add Aaron D. Ford,  
6 Attorney General of the State of Nevada, as counsel for respondents, and electronically serve the  
7 petition and a copy of this order on the respondents. Respondents are not required to appear in  
8 this proceeding or respond to the petition until directed to do so by the court.

9 IT IS FURTHER ORDERED that petitioner's motion for appointment of counsel is  
10 denied.

11 IT IS FURTHER ORDERED that petitioner shall have 30 days from the date of the entry  
12 of this order on the record within which to file an amended petition if he so chooses. In addition  
13 to correcting the problems which the court has identified, petitioner shall include in that amended  
14 petition any and all additional claims for habeas corpus relief of which petitioner is aware.

15 IT IS FURTHER ORDERED that the Clerk shall send petitioner a noncapital Section  
16 2254 habeas petition form, one copy of the instructions for the form, and a copy of his initial  
17 habeas petition.

18 Dated: June 18, 2020



U.S. District Judge Kent J. Dawson